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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210559
Party	Defendant East Coast Network Services, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

NetCloud, LLC
Opposer

v.

East Coast Network Services, LLC
Applicant

Opposition No. 91210559

**APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR
RECONSIDERATION OF FINAL DECISION**

Applicant East Coast Network Services, LLC responds to Opposer's motion as follows.

I. Opposer's Motion is Not Permitted by the Trademark Rules of Practice

Opposer's motion is not permitted by the Trademark Rules of Practice, which only allow one motion for reconsideration of final decision to be filed in an inter partes proceeding. "A second or subsequent request for reconsideration is not permitted, and if filed, does not toll the time for filing an appeal of the final decision or commencing a civil action." TBMP § 543 (2015).

Accord TBMP § 902.02 (2015) ("the Board's rules do not permit a second or subsequent request for reconsideration"); TBMP § 903.04 (2015) (same); *United States Postal Service v. RPost Int'l Ltd.*, Opp. No. 91158431, 131 TTABVue 8 n.13 (2014) ("neither Trademark Rule 2.129(c) nor any of the other rules of practice applicable to Board proceedings contemplate a second request for reconsideration of a final decision in a Board inter partes case"); *Black Bear Bottling Group v. Black Bear Spring Water LLC*, Opp. No. 92050665, 43 TTABVue 5 n.7 (2011) (same); *Hawkins v. Green Resource Group, LLC*, Opp. No. 91190109, 54 TTABVue 2 (2012) ("There is no provision in the Trademark Rules for filing a second or subsequent request for reconsideration."); *Magnadyne Corp. v. Movievision, Inc.*, Opp. No. 91175280, 30 TTABVue 4 (2010) (same).

Opposer's avenue for further review of the Board's decision is by way of appeal, and Applicant does not agree or stipulate to any extension of Opposer's deadline for filing an appeal on account of Opposer's improvidently filed motion for reconsideration.

II. Opposer Has Not Demonstrated That the Board Erred

Opposer has not demonstrated that the Board erred in any way, and instead merely restates arguments that it has made or could have made earlier.

A. The Board Did Not Err in Striking the Exhibits Improperly Attached to Opposer's Reply Brief

As an initial matter, Opposer did not file a response to Applicant's original motion to strike and thus the motion was uncontested before the Board. Therefore, the Board should deem untimely and waived any of Opposer's arguments challenging the Board's decision granting the uncontested motion.

Additionally, Opposer conflates two different meanings of the term “evidentiary matter.” TBMP § 539 clearly states that a party may not attach to its brief on the case “evidentiary material” not of record (or “evidentiary matter” not of record, as phrased by TBMP § 801.05), that is, documents and things other than a party's arguments. TBMP §§ 539, 801.05 (2015).

Opposer does violence to the plain meaning of this rule and the Board's decision by arguing that Applicant's relevancy objections in its trial brief created an “evidentiary matter” for the Board to decide. Nonetheless, nowhere in its garbled reasoning does Opposer cite any rule or authority that would permit Opposer to respond to this “matter” by attaching its own initial disclosures and discovery responses to its brief on the case. Indeed, Opposer even states that it “wholeheartedly agrees with the Board that Opposer cannot make of record such documents.” 27 TTABVue 3.

Simply put, Opposer cannot make of record its own initial disclosures and discovery responses, and if something is not of record (let alone not capable of being entered into the record) it cannot be attached to a brief on the case.

Finally, Applicant's relevancy objections were directed toward the insufficient notice provided by Opposer's pleadings. Since initial disclosures and discovery responses form no part of the pleadings, Opposer's exhibits are completely irrelevant to determining the scope of Opposer's pleadings and consequently the Board made no error in striking Exhibits A, B, and C from Opposer's reply brief.

B. The Board Did Not Err in Striking All Evidence Purporting to Show Use by Unpleaded Entities

Opposer's notice of opposition only pleads use by the Opposer, NetCloud, LLC, and does not plead use by any other individual or entity. The Board succinctly states the operative rule at 26

TTABVue 7-8:

Where testimony and exhibits relating to the adoption and use by opposer of trademarks are not the subject of any allegations in the pleadings, and applicant has objected at trial to the consideration of such matter on the ground of irrelevancy and renewed its objections in its brief, the evidence will not be considered by this Board in resolving the issues before it.

Long John Silver's Inc. v. Lou Scharf Incorporated, 213 USPQ 263, 266 (TTAB 1982).

Opposer has not shown that the Board made any error in the application of this rule to this case. Opposer's notice of opposition states that “[s]ince long before any date on which Applicant could reasonably rely, Opposer has been continuously using the trademark NETCLOUD in commerce in connection with cloud virtual private server (cloud VPS) services and cloud hosting services.”

This statement is clearly contradicted by Opposer's evidence showing that Opposer was not formed until December 31, 2012, subsequent to Applicant's application date of November 12, 2012. Opposer's notice of opposition clearly does not plead or make reference to use by any other individual or entity, and the Board made no error in finding that evidence purporting to show use by such unpleaded entities is beyond the scope of the pleadings.

Applicant also notes that Opposer again advances its wholly unsupported “actual notice” theory, yet still fails to explain why its initial disclosures are deceptively misleading and inconsistent with the evidence that Opposer later presented at trial, and thus provided no “actual notice” at all. In any event Opposer's initial disclosures and discovery responses form no part of the pleadings and are not part of the record in this proceeding, and the Board committed no error in disregarding this unsupported theory.

III. Opposer is Not Entitled to a Different Outcome in This Case

Even if the Board were to grant Opposer's motion, Opposer would still not be entitled to a different ultimate outcome in this case.

Granting Opposer's motion would require the Board to revisit several issues rendered moot by the Board's decision on reconsideration, specifically "whether Opposer's alleged volume of sales should qualify as *bona fide* use of a mark in the ordinary course of trade, or to consider the newly-raised questions about whether Opposer presented this Board with probative documents, or whether the several purported assignments of the business and the alleged customer relationships as described were genuine, arms-length transactions," as well as Applicant's motion to reopen discovery and trial periods. 26 TTABVue 9.

In the event the Board grants Opposer's motion, Applicant reiterates every argument it has previously made with respect to these mooted issues, and specifically incorporates by reference Applicant's arguments made at 14, 20, 22, 23, and 25 TTABVue.

IV. Conclusion

For the foregoing reasons Applicant requests that Opposer's motion be denied in full and that Applicant's registration be permitted to issue.

Dated this 19th day of January, 2016.

/Russell Logan/
Russell Logan, Esquire
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR RECONSIDERATION OF FINAL DECISION** has been served on NetCloud, LLC by emailing said copy on 1/19/2016, to Morris E. Turek, counsel for Opposer, at morris@yourtrademarkattorney.com.

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